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No. 92-1434

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JON EDELMAN,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT IN REPLY	1
1. The Decision Conflicts With Holdings of Other Circuits and of This Court That There Must Be a Complete Record Before an *Ex Parte* Meeting Can Be Held To Be Harmless	1
2. The Decision Conflicts With Holdings of Other Circuits That the Burden To Establish Harmlessness Is on the Prosecution	3
3. This Court Should Resolve Whether an *Ex Parte* Meeting Involving Secret Collaboration Between Judge and Prosecution Is a Reversible Structural Defect, or Is Subject to Harmless-Error Analysis	4
CONCLUSION	6
ADDENDUM	1a

TABLE OF AUTHORITIES

Cases: Page

Arizona v. *Fulminante*, 111 S. Ct. 1246 (1991) 4
Grieco v. *Meachum*, 533 F.2d 713 (1st Cir.), *cert. denied sub nom. Cassesso* v. *Meachum*, 429 U.S. 858 (1976) 2
Guenther v. *Commissioner*, 889 F.2d 882 (9th Cir. 1989) 2
Haller v. *Robbins*, 409 F.2d 857 (1st Cir. 1969) 3
Rushen v. *Spain*, 464 U.S. 114 (1983) 2, 4
State v. *McGuinn*, 268 S.C. 112, 232 S.E.2d 229 (1977) 2
Sullivan v. *Louisiana*, No. 92-5129 (U.S. June 1, 1993) 4
Tumey v. *Ohio*, 273 U.S. 510 (1927) 4, 5
United States v. *Hackett*, 638 F.2d 1179 (9th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981) 3
United States v. *LaFuente*, 1993 U.S. App. Lexis 8181 (8th Cir. Apr. 19, 1993) 1
United States v. *Minsky*, 963 F.2d 870 (6th Cir. 1992) 3, 5
United States v. *Thompson*, 827 F.2d 1254 (9th Cir. 1987) 1

Miscellaneous:

Brief for the Plaintiff-Appellee United States of America, *United States* v. *Minsky*, No. 91-5861, U.S.C.A., 6th Cir. (Jan. 17, 1992) 5

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1. The Decision Conflicts With Holdings of Other Circuits and of This Court That There Must Be a Complete Record Before an *Ex Parte* Meeting Can Be Held To Be Harmless.

The Brief in Opposition does not deny that the First, Ninth and Eleventh Circuits, as well as several state supreme courts, forcefully hold that in reviewing *ex parte* meetings in a criminal trial, "[w]e can only serve our function when the record is clear as to the relevant facts . . . ." *United States* v. *Thompson*, 827 F.2d 1254, 1261 (9th Cir. 1987). See Pet. 8-12. To that list now can be added the Eighth Circuit, which six weeks ago held that an allegation of an *ex parte* meeting between a federal judge and a prosecutor and witness required an evidentiary hearing. *United States* v. *LaFuente*, 1993 U.S. App. Lexis 8181 (8th Cir. Apr. 19, 1993). The Eighth Circuit explained:

> "The government denies the allegation, but has not offered any affidavit to refute it. Accordingly, we must remand this case to the district court with directions that it hold an evidentiary hearing to determine whether any such ex parte conferences occurred."

1993 U.S. App. Lexis 8181 at *6 (footnote omitted).

That is exactly the situation here: arguments from the government, but no affidavit. Yet the Second Circuit, with one of the most active federal criminal dockets in the country, holds diametrically the opposite of the Eighth and at least three others.[1] The Second Circuit's decision also conflicts with *Rushen* v. *Spain*, 464 U.S. 114 (1983), which provided clear guidance that even an *ex parte* contact between judge and juror that was part of the "day-to-day realities of courtroom life" called for an evidentiary hearing. See 464 U.S. at 119-20.

The Brief in Opposition simply asserts that "[h]ere, unlike in *Rushen* v. *Spain*, a transcript of the *ex parte* conference was available, and the record provided the court of appeals with a sufficient means of determining the contents of the chart given the judge." Br. Opp. 14 (footnote omitted). Yet the Brief in Opposition does not deny that the material the prosecutor handed the judge, and which the judge agreed to study, Pet. App. 30a, is

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[1] In atempting to distinguish some of these many cases, the government simply underscores the conflict. In *Grieco* v. *Meachum*, 533 F.2d 713 (1st Cir.), *cert. denied sub nom. Cassesso* v. *Meachum*, 429 U.S. 858 (1976), as the government acknowledges, "the prosecutor, however, testified" at a post-trial evidentiary hearing. Br. Opp. 11. Moreover, the affirmance in *Grieco* rested on waiver. See 533 F.2d at 719. In *Guenther* v. *Commissioner*, 889 F.2d 882 (9th Cir. 1989), where as here the document submitted *ex parte* was not in the record, the Ninth Circuit remanded "with instructions to conduct an evidentiary hearing." 889 F.2d at 885. The Brief in Opposition simply asserts that "[t]he decision below is also consistent with *State* v. *McGuinn*," 268 S.C. 112, 232 S.E.2d 229 (1977); but that case reversed exactly because there was no complete record of the *ex parte* activity.

nowhere in the record. The Brief in Opposition simply pretends, with no record support, that the transcript of some portion of the secret meeting was complete. Br. Opp. 9. For no affidavit was ever submitted stating that the transcript was complete. Nor did the district judge ever say that it was. The government's pretense that the transcript of the secret meeting in the robing room was complete is refuted by the transcript itself, which indicates that it began with the arrival of the court reporter.

The government also incorrectly asserts to this Court that petitioner failed timely to raise in the Court of Appeals the issue "that the transcript is incomplete on its face" and "that the chart that was shown to the judge was not before the court of appeals." Br. Opp. 8. It states that "Edelman first challenged the adequacy of the record before the court of appeals in his petition for rehearing." *Id.* at 8 n.5. The government's assertion is flatly mistaken. The issue was raised and argued in the reply briefs prior to argument in the Court of Appeals. See pertinent portions reproduced at Addendum A. It was reiterated on petition for rehearing.

2. The Decision Conflicts With Holdings of Other Circuits That the Burden To Establish Harmlessness Is on the Prosecution.

The Brief in Opposition does not deny that at least three circuits place upon the government the "heavy" burden of demonstrating that an *ex parte* communication between judge and prosecutor was harmless. *United States* v. *Minsky*, 963 F.2d 870, 874 (6th Cir. 1992); *United States* v. *Hackett*, 638 F.2d 1179, 1188 (9th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *Haller* v. *Robbins*, 409 F.2d 857, 860 (1st Cir. 1969). See Pet. 12-13.

The Brief in Opposition also does not deny that the Second Circuit did not follow that rule here. The govern-

ment tries to shrug off this conflict with a comment that the Second Circuit "did not explicitly address the question." Br. Opp. 12. Indeed, the Second Circuit not only failed to "address" the rule elsewhere observed—it failed to follow it. It placed no burden on the government—not even the small burden of providing an affidavit to explain exactly what had occurred. The court of appeals affirmed because it concluded that whatever took place at the secret *ex part* meeting—at which, of course, neither petitioner nor his counsel was present—had not caused the district court to commit error. Pet. App. 18a-19a. That not only relieved the prosecution of its "heavy" burden, but shifted the burden to the defendant, who was not at the secret meeting. The Second Circuit affirmed "even if the conference did influence the judge's decision." Pet. App. 19a. Such a ruling assumes that secret *ex parte* meetings that bring about defensible discretionary rulings by the judge are harmless, an extraordinary proposition. This plainly is different law from that applied in the First, Sixth and Ninth Circuits.

3. This Court Should Resolve Whether an *Ex Parte* Meeting Involving Secret Collaboration Between Judge and Prosecution Is a Reversible Structural Defect, or Is Subject to Harmless-Error Analysis.

This Court's decision in *Sullivan* v. *Louisiana*, No. 92-5129 (U.S. June 1, 1993), reiterates that harmless-error analysis is inapplicable when there are "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." Slip op. at 6, quoting *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1265 (1991). This Court has frequently cited, as an example of such a "structural defect," bias on the part of the judge. See *Tumey* v. *Ohio*, 273 U.S. 510 (1927), cited in *Sullivan*, slip op. at 4. On the other hand, most ordinary *ex parte* exchanges are subject to harmless-error analysis—provided there is a clear and complete record of what happened. *Rushen* v. *Spain*, *supra*.

This case presents as a threshold question whether the proper analysis is (a) a reversible "structural defect," or instead (b) possible harmless error, when an *ex parte* meeting is of a kind so extreme as the one here—when it is held in secret and kept secret at the judge's direction, when the subject is prosecution strategy, and when the court of appeals concludes that the purpose was "a blatant attempt to win a tactical advantage, to get a 'leg up.' " Pet. App. 18a. Petitioner submits that a secret *ex parte* meeting of this nature so taints the decisional process that it most closely resembles the structural defect of a biased judge.[2] *Tumey* v. *Ohio*, *supra*. Thus last year in *United States* v. *Minsky*, 963 F.2d 870 (6th Cir. 1992), the Sixth Circuit reversed outright, holding that a recorded *ex parte* bench conference with the prosecutor was enough in itself to require reversal. *Minsky* and the Second Circuit's rule here are irreconcilable.[3]

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[2] The government's attempt to recharacterize the *ex parte* meeting as simply an innocent scheduling matter, Br. Opp. 17, was emphatically rejected in strong language by the Court of Appeals. Pet. App. 17a-18a.

[3] The government now argues that "in *United States* v. *Minsky*, there was no reason for the court to consider whether the defense had identified any prejudice, because the potential for prejudice was obvious . . . ." Br. Opp. 13 n.9. Yet previously the government's description of *Minsky* was the opposite: that "[t]he United States submits that no constitutional rights of the defendant were violated by the *ex parte* conference. In fact, the conference assured that neither the defendant's constitutional rights, and the governments [*sic*] rights to nondisclosure, were violated." Brief for the Plaintiff-Appellee United States of America, *United States* v. *Minsky*, No. 91-5861, U.S.C.A., 6th Cir., Jan. 17, 1992, at 42.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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